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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re ARNOLD JACOBSON On Habeas Corpus.	B195521 (Los Angeles County Super. Ct. No. BH003835)

ORIGINAL PROCEEDINGS in Habeas Corpus. David S. Wesley, Judge. Affirmed.

Edmund G. Brown, Jr., Attorney General, Mary Jo Graves and Dane R. Gillette, Chief Assistant Attorneys General, Julie L. Garland, Assistant Attorney General, Anya M. Binsacca and Amanda Lloyd, Deputy Attorneys General, for Appellant.

Jeffrey A. Lowe and Nancy L. Tetreault, under appointment by the Court of Appeal, for Respondent.

Governor Arnold Schwarzenegger appeals from the superior court's order granting petitioner Arnold Jacobson's petition for writ of habeas corpus, and vacating the Governor's decision to reverse the Board of Parole Hearings' determination that petitioner is suitable for parole. (Pen. Code, § 1507.)[1] In our first opinion in this matter, we reversed the superior court's order. The California Supreme Court granted review, and, following the decisions in *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*) and *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*), remanded the case to us for reconsideration. We have received supplemental briefing, and now affirm the order vacating the Governor's decision.

FACTUAL AND PROCEDURAL BACKGROUND

In an October 1985 non-jury trial, a judge convicted petitioner of one count of second degree murder (Pen. Code, § 187)[2] and one count of attempted murder (§§ 664/187), finding that he used a firearm (§ 12022.5) in both crimes. On the murder count, the judge sentenced him to a term of 17 years to life in state prison (15 years to life for murder, plus two years for the handgun use enhancement), and a concurrent term of nine years for the attempted murder.

The convictions arose from a shooting on March 13, 1985, when petitioner was 59 years old. The attempted murder victim was petitioner's ex-girlfriend, Sonja Sharlow; the murder victim was Sharlow's friend, Patty Silviera.

On the night of the shooting, petitioner followed Sharlow to a bar in Long Beach, the Barge Inn. Petitioner had been following Sharlow frequently since their

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[1] The notice of appeal also named Bob Horel, the Acting Warden of California State Prison, Solano, as an appellant.

[2] All subsequent undesignated statutory references are to the Penal Code.

break-up. When Sharlow saw petitioner in his camper truck in the parking lot, she ran toward the bar. Petitioner shot her in the leg with a .25 caliber pistol. Sharlow was able to enter the bar, where she told her friend, Silviera, what had happened. Silviera had been acting as an intermediary between petitioner and Sharlow in petitioner's attempt at reconciliation. Silviera ran out of the bar to petitioner's camper. Petitioner shot her in the chest at close range, killing her. Petitioner fled in his camper. Later, police found one .25 caliber bullet and four spent .25 caliber shell casings at the scene. Petitioner abandoned his truck, discarded the gun, and fled the state. He later returned to California, and was apprehended on March 25, 1985.

At trial, petitioner testified that he was intoxicated at the time of the shooting, and did not intend to injure either Sharlow or Silviera. He had been drinking all day, and followed Sharlow to the Barge Inn. When Sharlow got out of her car, he asked to speak to her, but she ran toward the bar. Petitioner retrieved a handgun from under a mattress in the back of his camper, and fired. Then Silviera suddenly appeared beside his truck. Petitioner was holding the gun in his right hand, leaning against the door. Startled by Silviera, petitioner jerked back, and the gun went off.

In convicting petitioner of second degree murder in the killing of Silviera, the judge rejected petitioner's version of events. On appeal, this court affirmed the judgment. We held that substantial evidence supported the trial judge's findings that "appellant's capacity for malice was not impaired by voluntary intoxication since he was able to drive his camper truck all day, recalled the entire day's events, and had known where to quickly retrieve his handgun. Malice aforethought for second degree murder was implied because appellant was familiar with guns yet deliberately shot Silviera in the chest at close range without provocation, showing a conscious disregard for human life."

Petitioner was received by the California Department of Corrections on November 6, 1985. The Department set his minimum eligible parole date as July 26, 1995.

In his ninth parole review on April 7, 2005, the Board found petitioner suitable for parole. He was then age 80, and had served more than 19 years in prison since his commitment. In finding that petitioner would not pose an unreasonable risk of danger to public safety, the Board cited many positive factors supported by the record. Before his prison commitment, petitioner had no significant criminal history. While in prison, he had only three disciplinary violations. The most recent (a Sept. 1992 citation for conspiracy to introduce dangerous contraband) occurred more than 12 years earlier, and was reduced to an administrative violation. Petitioner had consistently participated in Narcotics Anonymous and Alcoholics Anonymous. He had realistic parole plans, which included a prospective residence and job, Social Security income, and a support system provided by fellow military veterans involved in the American Legion. According to the Board, petitioner had shown "signs of remorse and indicates that he understands the nature and the magnitude of his crime. He accepted responsibility for it and [has] a desire to change towards good citizenship." The Board noted that a 2003 report from his correctional counselor, and reports from psychologists in 1999 and 2001, expressed the opinion that petitioner posed a minimal risk to public safety. The 2001 psychological report stated that given petitioner's "history, his mental condition, his age and physical health [petitioner suffers from a fused left knee] it is difficult to see him as becoming in any way dangerous."

On August 24, 2005, the Governor reversed the Board's parole grant. In his written decision, the Governor noted that petitioner "has remained discipline-free since 1992" and "has also taken steps in prison to enhance his ability to function

within the law upon release. He has received vocational training through various institutional jobs, has participated in an array of self-help and therapy . . . , and has received positive evaluations from mental-health and correctional professionals. Likewise, he has made confirmed parole plans that include housing arrangements and legitimate means for financial support. These are all factors supportive of [petitioner's] release to parole."

However, based on the circumstances of petitioner's commitment offense, the Governor concluded that petitioner posed an unreasonable risk of danger if paroled. Although the Board had cited petitioner's acceptance of responsibility for the murder of Patty Silviera and his understanding of the nature and magnitude of his crime, the Governor questioned the extent of petitioner's true acceptance of responsibility, and questioned petitioner's consequent expressions of remorse. The Governor observed that petitioner consistently maintained that he killed Patty Silviera only because "when [he was] sitting in his truck with the gun still in his hand after shooting Ms. Sharlow, he was startled by Ms. Silviera's confrontation and made a jerking motion causing the gun to discharge." The Governor noted, however, that "the trial court [that heard the evidence] did not believe [petitioner's] version of the crime and found him guilty of second-degree murder. Moreover, the Court of Appeal, in its opinion affirming the judgment . . . concluded, '[m]alice aforethought for second degree murder was implied because [petitioner] was familiar with guns yet deliberately shot . . . Silviera in the chest at close range without provocation, showing a conscious disregard for human life.'"

The Governor found the killing of Silviera to be particularly aggravated: "[Petitioner] followed [Sonja] Sharlow to a bar, shot and wounded her when she refused to talk to him, and then shot . . . Silviera in the chest 'deliberately' and 'at close range' when she tried to approach him afterwards. [Petitioner's] murderous actions make the life offense for which he was convicted especially grave because

they included his violent victimization of two women – resulting in his conviction for both murder and attempted murder and exceeding the minimum necessary to sustain a conviction for second-degree murder. The gravity of the murder committed by [petitioner] is alone a sufficient basis to conclude at this time that his release from prison would pose an unreasonable public-safety risk." The Governor also noted that although petitioner "told the 2003 Board that he could not remember how many gunshots he fired in total, the appellate decision stated that one bullet and four casings were found at the crime scene, indicating that [petitioner] fired multiple shots in the parking lot that night."

The Governor discounted petitioner's current age as a factor favoring parole. "At 80 years old now, [petitioner] has been in prison for a long time and can be said to have a reduced likelihood for recidivism due to his advanced age. Nevertheless, [he] was 59 years old when he armed himself with a .25-caliber handgun and shot two women, killing one of them, and his age is not a factor tipping the scales in favor of his parole suitability at this time."

The Governor concluded: "After carefully considering the very same factors the Board is required to consider, I find the gravity of the second-degree murder committed by [petitioner] presently outweighs the factors tending to support his release. Accordingly, because I believe his release from prison would pose an unreasonable risk of danger to society at this time, I REVERSE the Board's 2005 decision to grant parole."

Petitioner filed a petition for writ of habeas corpus in the superior court challenging the Governor's decision. After issuing an order to show cause and receiving briefing, the superior court granted the petition and ordered petitioner released on parole in accordance with the Board's determination.

DISCUSSION

Appellant contends that under the clarified standard of *In re Lawrence, supra*, 44 Cal.4th 1181 and *In re Shaputis, supra*, 44 Cal.4th 1241, "some evidence" supports the Governor's decision to reverse the Board's decision to grant parole. We disagree.

In *Lawrence* and *Shaputis*, the Supreme Court clarified the courts' role in reviewing the Governor's decision to vacate a decision granting parole. "[I]f we are to give meaning to the statute's [Pen. Code, § 3041, subd. (a)] directive that the Board shall normally set a parole release date [citation], a reviewing court's inquiry must extend beyond searching the record for some evidence that the commitment offense was particularly egregious and for a mere acknowledgment by the Board or the Governor that evidence favoring suitability exists. Instead, under the statute and governing regulations, the circumstances of the commitment offense (or any of the other factors related to unsuitability) establish unsuitability if, and only if, those circumstances are probative to the determination that a prisoner remains a danger to the public. It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public. [¶] Accordingly, when a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the decision of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Lawrence, supra*, 44 Cal.4th at p. 1212, italics deleted; see *Shaputis, supra*, 44 Cal.4th at p. 1254.)

As to consideration of the commitment offense, the court further explained, "[A]lthough the Board and the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole,

the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." (*Lawrence*, *supra*, 44 Cal.4th at p. 1214; see *Shaputis*, *supra*, 44 Cal.4th at pp. 1254-1255.)

In the present case, the Governor relied primarily on the circumstances of the commitment offenses. To support the Governor's decision, *Lawrence* and *Shaputis* require, in addition to the aggravated nature of petitioner's crimes, some indication from his history or current demeanor or mental state that he remains a danger. Recognizing this standard, appellant relies on the Governor's questioning the efficacy of petitioner's expressions of remorse. As appellant phrases the argument, "the Governor's concerns regarding Jacobson's remorse and acceptance of responsibility go to his current state of mind and level of insight, which implicate his current dangerousness. Jacobson's pre- and post-incarceration history, including his questionable remorse and acceptance of responsibility, combined with his commitment offense, provide some evidence that he remains a threat to public safety." We disagree.

Although the Governor expressed concern about whether petitioner felt remorse or took responsibility for the crimes, the Governor did not actually *find* that petitioner lacked remorse or failed to accept responsibility. Nor did he find that petitioner lacked insight into his behavior and remained dangerous because of it. Rather, in commenting on petitioner's expressions of remorse, the Governor observed that petitioner's version of Silviera's murder as an accident was not believed by the trial court, and that the appellate court found the evidence

sufficient to prove malice aforethought. The Governor, of course, was entitled to question petitioner's version of events. But his disbelief of petitioner's version does not provide some evidence that petitioner remains dangerous.

The present case is not one in which the record supports a determination that, despite the inmate's expressions of some remorse, he "failed to gain insight or understanding into either his violent conduct or his commission of the commitment offense." (*Shaputis*, *supra*, 44 Cal.4th at p. 1260.) Here, petitioner had no record of violence prior to the shooting. Indeed, other than the convictions that resulted from the shooting, he had no significant criminal record. Thus, he had no prior criminal history requiring insight. Although petitioner continued to describe the murder of Silviera as accidental, the evidence is undisputed that he had gained a significant level of insight into his crimes. He fully acknowledged his responsibility for the shooting of Sharlow, and did not claim it was accidental. To the contrary, he admitted frequently arguing with her, following her to the bar where the shooting took place, and intentionally firing at her. The record is also undisputed that petitioner's alcoholism played a significant role in the shooting of Sharlow and the murder of Silviera. While in custody, petitioner had taken steps to counter his condition by regularly attending Alcoholics Anonymous meetings (as well as Narcotics Anonymous), and had remained alcohol-free in custody. Thus, regardless of the Governor's views on petitioner's expressions of remorse, the record does not support a finding that petitioner was so lacking in insight into his criminal behavior that he remained a danger.

The following evidence is also undisputed. While in prison, petitioner had had only three disciplinary violations. The last one (which was reduced to an administrative rule violation) occurred 12 years before his parole hearing. The evaluations by his correctional counselors and examining psychiatrist unanimously concluded that he would pose a minimal threat if released. He was 80 years old at

the time of the Governor's decision, had participated in vocational training, and had realistic parole plans.

On this record, petitioner's persistent claim that he shot Silviera accidentally does not, as required by *Lawrence* and *Shaputis*, "indicate[] that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." (*Lawrence, supra*, 44 Cal.4th at p. 1214; see *Shaputis, supra,* 44 Cal.4th at pp. 1254-1255.) Rather, in light of the entire record, we find no link between this factor and the notion that petitioner remains a danger. Thus, we conclude that the Governor's decision is not supported by "some evidence."

We disagree with the Attorney General's contention that the separation of powers under our state constitution requires us to remand the case to the Governor for further consideration in light of *Lawrence* and *Shaputis*. "The Governor's constitutional authority is limited to a review of the evidence presented to the Board. (Cal. Const., art. V, § 8, subd. (b) [the Governor may only affirm, modify or reverse the Board's decision 'on the basis of the same factors which the parole authority is required to consider']; see also Pen. Code, § 3041.2, subd. (a).) Our review indicates that the record does not contain some evidence to support the Governor's decision and further consideration by the Governor will not change this fact." (*In re Vasquez* (2009) 170 Cal.App.4th 370, 386.) Thus, reinstating the Board's decision does not infringe on the Governor's legitimate constitutional authority.

DISPOSITION

The order granting the petition for writ of habeas corpus, and vacating the Governor's decision to reverse the Board of Parole Hearings' determination that petitioner is suitable for parole, is affirmed. The Board's decision is reinstated.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.